What does the future hold for the defence under s4 of the Defamation Act 2013?

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Considering section 4 of the Defamation Act 2013

- The past:
  The common law - *Reynolds*

- The present: section 4
  What the statute says
  Case law so far

- The future
  Economou in the Court of Appeal

Or

- From darkness – to responsibility – to reasonableness – and beyond (or back again)?

1999: the common law invents the *Reynolds* defence

- Handy reference to key common law "responsible journalism" cases:

- ***Reynolds v Times Newspapers Limited*** [2001] 2 AC 127 (28.10.99)
  Birth of the defence.

- ***Bonnick v Morris*** [2002] UKPC 31; [2003] 1 AC 300
  Key on the role of "meaning" when considering the defence.

- ***Jameel v Wall Street Journal Europe Sprl*** [2007] 1 AC 359
  Reaffirmation of the defence (much-needed).

- ***Flood v Times Newspapers Ltd*** [2012] UKSC 11, [2012] 2 AC 273
  Confirmation of the existence of the defence (ditto).

- Example from the dark days: *Bennett v Guardian* [1997] EMLR 625 (5.12.95)

Reynolds: a defence to protect "responsible journalism"

- HL refused to create a defence for all "political speech" – but created a defence to protect publication to the public (even if truth could not be shown).

- "..A degree of uncertainty in borderline cases is inevitable. This uncertainty, coupled with the expense of court proceedings, may "chill" the publication of true statements of fact as well as those which are untrue. The chill factor is perhaps felt more keenly by the regional press, book publishers and broadcasters than the national press. However, the extent of this uncertainty should not be exaggerated. With the enunciation of some guidelines by the court, **any practical problems should be manageable**. The common law does not seek to set a higher standard than that of **responsible journalism**, a standard the media themselves espouse. An incursion into press freedom which goes no further than this would not seem to be excessive or disproportionate. The investigative journalist has adequate protection.."(202D-F)

The ten Nicholls factors (*Reynolds*)

1. Seriousness of the allegation (the more serious = the more the public is misinformed, and C harmed, if allegation not true).
2. Nature of the information / extent to which subject of public concern.
3. Source of the information – direct knowledge? axe to grind? being paid?
4. Steps taken to verify the information.
5. Status of the information (prior investigation commanding “respect”)
6. Urgency of the matter – news often a perishable commodity.
7. Whether comment sought from C – who may have information others do not possess/have not disclosed – approach to C “not always” necessary.
8. Whether publication contained gist of C's side of the story.
9. Tone of the article – can raise queries/call for investigation (not adopt as fact).
10. Circumstances of the publication, including the timing.

Factors are illustrative – not exhaustive – weight depends on facts of the case.

Example of *Reynolds* in action

Yeo v Times Newspapers Ltd

[2015] EWHC 3375 (QB) (25.11.15: trial) [128-194], [242] (Warby J)

- The defence sets a lower threshold than proving truth – it "should be less challenging" to show that the articles represented responsible journalism on a matter of public interest [128].

- J had "no hesitation" in finding the subject-matter was public interest: current (legitimate) concerns about standards of behaviour in Parliament in relation to lobbying by commercial organisations [129].

- General principles on "responsible journalism" [132]: include at (7) reference to need for journalist to have honest *and reasonable* belief in truth of an allegation of misconduct (when public interest lies in fact it is, or may be, true).

Yeo on *Reynolds* / public interest (2)

- The court will examine the relevant part of the "process" of publication [134].
- J considered whether Article 8 of ECHR was engaged [140-147] (not).
- J considered whether TNL's "conduct in gathering and publishing the defamatory information" was responsible: the requirements of responsible journalism were "comfortably met" [148]. He considered, **at each stage**, whether the honest beliefs and other relevant conduct of the journalists and TNL staff "were or were not reasonable and responsible" [152].
- This included: initial email to Yeo (not too vague); setting up the meeting (not too eager); meeting itself (reasonably interpreted by journalists); preparation of the articles (not distorted); "front up letter" (afforded reasonable opportunity to Yeo to comment); and content of articles (not unfair or inaccurate) [156ff].

Yeo on *Reynolds* / public interest (3)

- No requirement on TNL to publish the entire transcript of the meeting [174]. The defence protects, on public interest grounds, the publication of factual statements that are not proved to be true. “In short, a publication can be wrong but “fair” for these purposes”. J put it this way: “in a case such as this it will be “fair” to present readers with factual conclusions honestly and reasonably drawn by journalists who were themselves witnesses to the key events; it is permissible to summarise, and to be selective; if the evidential picture is misrepresented or presented in a wholly unbalanced way, that may well be unfair; but fairness does not require the publisher to present the reader with all the factual material that could support a competing assessment” [175]

- “it is not incumbent on the responsible journalist to lay out for the reader all the pros and cons relevant to a particular conclusion” [179]. (Would be different if there were items that undermined the central message of the article).

Reynolds subjected the "journalistic process" to close examination

- Another example of how to succeed in *Reynolds* defence:
  Hunt v Times Newspapers Limited [2013] EWHC 1868 (QB) (Simon J)
  D had behaved "fairly and responsibly in gathering the information and in ensuring what was published was accurate and fair". This was a "serious piece of investigative journalism which was expressed in forthright, but not extravagant, terms; and without tangential additions in order to 'liven up' the story."

- And an example of how *not* to succeed:
  Galloway v Telegraph Group Ltd [2005] EMLR 7 (trial: Eady J);
  [2006] EWCA Civ 17; [2006] EMLR 11 (appeal) at [72-77]
  D had "gone a long way" to "adopt and embellish" allegations in documents; no attempt to verify the allegations; serious allegation not put (during phone call) with C; articles did not include gist of his response; tone was dramatic and condemnatory.

The process – and the people who followed the process (or were meant to) – are on trial.

See also the approach of Nicklin J

Sooben v Badal [2017] EWHC Civ 2638 (QB) (31.10.17)

- J rejected *Reynolds* defence [26-28]: because inclusion of serious allegation (perjury) was "simply not justified by the overall public interest that attached to the general theme of [*name's*] interview. It was **gratuitous** and **unjustifiable** and would not therefore be protected by any *Reynolds* privilege" [28].

- ".. it was an allegation of such exceptional seriousness that its inclusion must have made a *real* contribution to the public interest element, not merely be a piece of interesting background or part of the narrative. This is not a matter of making an allowance for **editorial judgment**. That margin of appreciation is reserved to cases where the relevance of the particular matter to the story as a whole is a matter of **fine judgment**, upon which there **could be a reasonable disagreement**…" [28].

Sooben – the ten Nicholls factors

- J went on to consider whether D would have met the "standards of responsible journalism" [29-63] (D would not). The Nicholls factors were "not to be applied mechanistically"; their weight will vary from case to case [31]. But even an "amateur" journalist must meet minimum standards; that was not "onerous" – most of the Nicholls factors were "born of basic fairness that even an amateur journalist can understand and should observe" [34].

- Key factors here: gravity of the allegation [42], [55]; no real attempt to verify [45], [56]; and failure to contact C prior to publication [48-50], [59-61].

- In summary: "Stepping back, this was a very serious allegation presented in a wholly one-sided way in circumstances where [D] had failed to contact [C] and had failed to represent, from material he had, what could fairly have been said on [C's] behalf in answer to the allegations." [63]

With great power comes great responsibility

- “It is to be remembered that the *Reynolds p*rivilege, if upheld, deprives a claimant of a remedy in respect of a defamatory publication. The demonstration of journalistic responsibility in relation to a matter of public interest is what justifies that result. There has to be a minimum standard to be satisfied”: Nicklin J in *Sooben* at [34].

- “The law of civil defamation is directly concerned with the private law right not to be unjustly deprived of one's reputation and recognises the defence of privilege. The justification for this defence is at least in part based upon the needs of society. It can sensibly be asked why society or the law of defamation should tolerate any level of factual inaccuracy. The answer to this question is that any other approach would simply be impractical. Complete factual accuracy may not always be practically achievable nor may it always be possible definitely to establish what is true and what is not. Truth is not in practice an absolute criterion. ... Some degree of tolerance for factual inaccuracy has to be accepted; hence the need for a law of privilege.” Lord Hobhouse in *Reynolds* at 238C-E.

“Publication on matter of public interest” – Defamation Act 2013, s4

- s4(1): defence for D to show:
  (a) statement was (or formed part of) statement on a **matter of public interest**; and
  (b) D **reasonably believed** publication was in the public interest.

- Court **must** have regard to all the circumstances: s4(2)
- On reasonable belief, court **must** disregard any failure by D to take steps to verify truth *if* publication is an **accurate and impartial account** of a **dispute** to which **C was party**: 4(3).
- Court makes such allowance as it considers “appropriate” for editorial discretion: 4(4)
- Applies whether statement is one of fact or opinion: 4(5)
- Common law *Reynolds* defence abolished: 4(6)

From the Explanatory Notes on s4....

29.....This section creates a new defence to an action for defamation of publication on a matter of public interest. It is based on the existing common law defence established in ***Reynolds*** *..* and is intended to reflect the principles established in that case and in subsequent case law. *Subsection (1)* provides for the defence to be available in circumstances where the defendant can show that the statement complained of was, or formed part of, a statement on a matter of public interest and that he reasonably believed that publishing the statement complained of was in the public interest. The intention in this provision is to **reflect the existing common law** as most recently set out in ***Flood*** *..*It reflects the fact that the common law test contained both a subjective element – what the defendant believed was in the public interest at the time of publication – and an objective element – whether the belief was a reasonable one for the defendant to hold in all the circumstances.

..bit more from the Explanatory Notes on s4....

30. In relation to the first limb of this test, the section does not attempt to define what is meant by "the public interest". However, this is a concept which is well-established in the English common law. It is made clear that the defence applies if the statement complained of "was, *or formed part of*, a statement on a matter of public interest" to ensure that either the words complained of may be on a matter of public interest, or that a holistic view may be taken of the statement in the wider context of the document, article etc in which it is contained in order to decide if overall this is on a matter of public interest.

....

33. *Subsection (4)* requires the court, in considering whether the defendant's belief was reasonable, to make such allowance for editorial judgement as it considers appropriate. This expressly recognises the discretion given to editors in judgments such as that of *Flood,* but is **not limited to editors in the media context**.

..and a last bit from the Explanatory Notes on s4.

35. *Subsection (6)* abolishes the common law defence known as the Reynolds defence. This is because the statutory defence is **intended essentially to codify the common law defence.** While abolishing the common law defence means that the courts would be required to apply the words used in the statute, the current case law would constitute a **helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied**. It is expected the courts would **take the existing case law into consideration where appropriate**.

Economou v De Freitas

- Trial before Warby J – [2016] EWHC 1853 (QB), [2017] EMLR 4 (27.7.16)

APPEAL PENDING: 17 April 2018

Seven broad points about s4 – understood not to be in dispute [139]:

(1) It is not enough for the statement complained of to be, or to be part of, a publication *on* a matter *of* public interest. It must also be shown that the defendant reasonably believed that publication of the particular statement was *in* the public interest.
(2) To satisfy this second requirement, which I shall call "the Reasonable Belief requirement", the defendant must (a) prove as a fact that he believed that publishing the statement complained of was in the public interest, and (b) persuade the court that this was a reasonable belief.
(3) The reasonable belief must be held at the time of publication.....

Economou – broad points on s4

....

(4) The “circumstances” to be considered pursuant to s4(2) are those that go to whether or not the belief was held, and whether or not it was reasonable.

(5) The focus must therefore be on things the defendant said or knew or did, or failed to do, up to the time of publication. Events that happened later, or which were unknown to the defendant at the time he played his role in the publication, are unlikely to have any or any significant bearing on the key questions.

(6) The truth or falsity of the allegation complained of is not one of the relevant circumstances.

(7) It is not only those who edit media publications who are entitled to the benefit of the allowance for “editorial judgment” which s4(4) requires (see paragraph 33 of the Explanatory Notes).

Economou - findings on section 4(1)(a) and 4(1)(b)

- The statements related to a number of topics of undoubted public interest [143-150].

- As to what a D must believe [153]: “What s4(1)(b) requires is a belief that the publication of “the statement” is in the public interest. In my judgment this must refer **to the words complained of, rather than the defamatory imputation which those words convey**. That is consistent with the wording of the statute, which uses the term “imputation” to refer to the meaning of a statement.”

- As with *Reynolds*, the meaning that D *intended* to convey is relevant (even if the publication *unintentionally* conveyed a different meaning): and see ***Bonnick v Morris*** [2003] 1 AC 300 PC.

Economou – carry on *Reynolds*?

- Role of *Reynolds* factors considered [237-240]. There was "much to be said" for C's argument that the Nicholls factors should guide the court in deciding whether D had the reasonable belief under s4(1)(b) [238]. It "seems hard to describe a belief as reasonable if it has been arrived at without care, in the absence of any examination of relevant factors, and without engaging in appropriate enquiries". J notes that D accepted that some factors "may" be relevant and important [239].

- Some *Reynolds* factors "must on any view" carry through to the new law: flexibility; adaptability to circumstances of individual case; recognition that there is little scope (under Art 10.2 ECHR) for restrictions on questions of public interest; and the allowance for editorial judgment [239-240]. There is a need to show that a restriction is "necessary and proportionate" [240].

Economou – approach to "reasonable" belief

- "I would consider a belief to be **reasonable** for the purposes of s4 **only** if it is one arrived at after **conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case**. Among the circumstances relevant to the question of what enquiries and checks are needed, the **subject-matter** needs consideration, as do **the particular words used**, the **range of meanings** the defendant ought reasonably to have considered they might convey, and the **particular role** of the defendant in question." [241]

- D's role was closer to a source/contributor than journalist; he was an interviewee [242]. C's case included, in effect, that D should not have attacked the CPS as he did [248].

- J applied the principles to the facts and stated his conclusions [249-259].

Economou – s4 not just for journalists – for each, a "bespoke" defence

- Would be "wrong in principle" to require someone contributing material for a media article/broadcast to undertake all enquiries expected of the journalist.

  "[246] The enquiries and checks that can reasonably be expected must be **bespoke**, depending on the precise role that the individual plays. It is hard to see how an individual could rely on the public interest defence to escape liability for a false factual statement about events within their own knowledge ...But I see no reason why the defence should not avail an individual source or contributor who passes to a journalist for publication information the truth or falsity of which is **not within the knowledge of the contributor**. **The contributor may well be entitled to rely on the journalist to carry out at least some of the necessary investigation and to incorporate such additional material as is required,** in order to ensure appropriate protection for the reputation of others."

A second look at s4 at trial (also Warby J)

Hourani v Thomson (and others) [2017] EWHC 432 (QB) (10.3.17)

- Two (of four) Ds sued for libel claimed to be protected by s4. That defence played "only a fairly small part" in the case [164] and is dealt with at [164-174].

- s4(1)(a) test was met: though "it is not by any means obvious that to parade in public holding a placard bearing a person's photograph under the single word "murderer" is, or forms part of, "a statement on a matter of public interest." It looks more like a bare accusation, unexplained by any context" [166],

- s4(1)(b) required a focus on the "twin questions" of (a) whether the necessary belief was held and (b) whether any such belief was a reasonable one [168]. Neither D had shown they'd believed publication of the statement was in the public interest (they hadn't addressed their minds to that) [169-172]. Anyway, there would have been no reasonable basis for any such belief [173-174].

Also to note from Warby J on s4

Suresh v Samad and others

[2017] EWHC 76 (QB) (27 January 2017) (Warby J)

- J refused permission to amend to allege "truth" or to rely on "publication on matter of public interest" (except that D3 was given permission to re-plead his "public interest" defence: see below). J took account of the fact that neither the police nor the Charity Commission had found any evidence of fraud to warrant an investigation: see [52] ("truth") and [65-66] ("public interest").
- Note J would have allowed D to run as alternative defences: (a) denial of publication (ie, no intention to publish at all) and (b) s4 (ie, reasonable belief that publication was in the public interest) [58].

[2017] EWHC 1743 (QB) (12 May 2017) (Warby J)

- D3's application to amend failed: he had failed to produce the draft in time and it was hopeless on the merits [17-26].

Lastly (for now) to note from Warby J on s4

- ***Barron v Vines*** [2015] EWHC 1161 (QB) (29.4.15). J gave the self-represented litigant chance to take advice about potential s4 defence; D decided he did not wish to do so: [61-65], [69]. s4 is a "new statutory defence", not yet the subject of any decision; Explanatory Notes suggest based on and intended to reflect *Reynolds*, but there is "inevitably some room for argument about its exact scope and application to particular facts" [64]

- Speech to the MLRC in September 2017: "...there is clearly force in the suggestion that the law should, in appropriate cases, enable a person whose reputation has been seriously injured by a false statement to secure a correction, even if the statement related to a matter of public interest and was reasonable at the time. It might be said that the public interest favours a correction in such a case."

  https://www.judiciary.gov.uk/wp-content/uploads/2017/09/mr-justice-warby-mlrc-20170926.pdf

Which direction will the Court of Appeal take on s4?

- Will the court say that a D can show that they had a "reasonable belief" that publication was in the public interest (only) if they meet the standard of "responsible journalism" (when forming that belief, pre-publication)?

- Will the court require an assessment of the s4 defence to be carried out by reference to *all* of the 10 Nicholls tests?

- How *flexible* is the defence – for journalists – and for others? What is the "minimum standard" (if not "responsible journalism")?

- Does the s4 defence need to break free from its origins (*Reynolds* contemplated publication to the public by mass media, through a process involving source(s) / journalist(s) / editor) – if, given the very different forms of mass communication now available, it is to be a defence for everyone?

- Who will be on the Court of Appeal for *Economou?*

- What will their attitude be to the balancing of the rights to reputation and freedom of expression (ECHR Articles 8 & 10)?

- What is the price to be paid for depriving a C who has been defamed of a remedy? What degree of tolerance for error will be allowed?

- Will they follow the lead of Warby J or (as with s1 in *Lachaux*) not?

Recent example of Court of Appeal on freedom of expression/reputation

- “102 … it is axiomatic.. that the right to freedom of expression is a Convention right of fundamental importance. It has been consistently recognised as such both in Strasbourg and domestic jurisprudence. The courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction: .. Further, special emphasis is placed on the protection of statements of a political nature, as well as statements on wider issues of legitimate public concern, to which the court must have particular regard by virtue of section 12(4) of the 1998 *[Human Rights]* Act. Accordingly, close attention must be paid to those rights, and in particular to the extent that the respondents' participation in a free press permits and requires them to exercise those rights.”

- No prizes for guessing the next word...

Recent example in Court of Appeal (continued)

- "103 **However**, article 10(2) permits restrictions on those rights for the protection of the reputation *and rights of others*, which includes, in this case, the private rights of the parties under an otherwise validly constituted contract of settlement. This is something to which the law attaches considerable importance and save in well-defined circumstances, such contracts would normally be enforced. The issue thus resolves itself into one of **proportionality**, and in particular, whether the restrictions in clause 3.2 *[of the settlement agreement]* are a disproportionate interference with the respondents' article 10 rights."

- There was a public interest in encouraging parties to settle litigation, on the basis that the court would enforce the agreement (freely entered into) [104].

Mionis v Democratic Press SA [2017] EWCA Civ 1194 (31.7.17)

Will the CA look at how Strasbourg balances Arts 8 & 10? A reminder

- ***Von Hannover v Germany (No 2)*** [2012] ECHR 227, [89-95]
- ***Axel Springer v Germany*** [2012] EMLR 15, [108-113]

The Grand Chamber set out criteria relevant to the balance between protecting *private* information and *publication*:

(i) contribution to a debate of general interest

(ii) how well known is the person concerned and what is the subject of the report?

(iii) prior conduct of the person concerned

(iv) method of obtaining the information and its veracity *(Springer)* / circumstances in which the photographs were taken (*Von Hannover)*

(v) content, form and consequences of the publication

(vi) severity of the sanction imposed

But do those criteria really work for *defamation* cases?

Will it consider what the relationship is between s4 and DPA s32?

- Section 32 of the **Data Protection Act 1998** provides that personal data which are processed '**only**' for the 'special purposes' – including the purposes of journalism - are exempt from key requirements under the DPA - IF:
  (a) The processing is undertaking with a view to the publication of journalistic material;
  (b) The data controller **reasonably believes** that, having regard in particular to the special importance of the public interest of freedom of expression, **publication would be in the public interest**; *and*
  (c) The data controller **reasonably believes** that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

- In considering the belief in s32(1)(b) - regard 'may' be had to the data controller's compliance with any 'code of practice' relevant to the publication and designated by the Secretary of State: s32(3).

DPA s32 – applies to anyone processing for the purposes of journalism

- ***Law Society v Kordowski*** [2011] EWHC 3185 (QB) [2014] EMLR 2 (Tugendhat J) held that s32 protected "journalism" in the sense of "communication of information or ideas to the public at large in the public interest. Today anyone with access to the internet can engage in journalism at no cost. If what the Defendant communicated to the public at large had the **necessary public interest**, he could invoke the protection for journalism and art.10..." [99].

- See also the Information Commissioner decision in ***Steinmetz v Global Witness*** (15.12.14): the campaigning NGO could invoke the exemption; its purpose was "to publish information, opinions or ideas for general public consumption. It is our view that this constitutes a journalistic purpose even if they are not professional journalists and the publication forms part of a wider campaign to promote a particular cause."

ZXC v Bloomberg LP

[2017] EWHC 328 (QB), [2017] EMLR 21 (Garnham J)

- Claim for breach of privacy, confidence and DPA: C wanted D to take down an article (about a criminal investigation) and to undertake not to republish. Principally of interest on the reporting of criminal investigations/privacy rights.

- On the DPA claim [53-61], D relied on s32. C could not show that he was likely to succeed in overcoming s32 [60]. D's witness statement (with confidential exhibit) made clear "that the decision to refer to [C] in the article was taken after careful consideration of the relevant circumstances, including the public interest in the disclosure of [C's] involvement. In my judgment, it is clear that [D] as data controller believed, and believed on reasonable grounds, that publication would be in the public interest" [59].

Guidance from the ICO on s32

The guide to s32 includes “Practical tips” (page 38):-

- have clear policies about what needs editorial approval;
- give all staff some basic data protection awareness training;
- have an inbuilt public interest check at key stages of a story;
- consider the data protection implications at key stages of a story; and
- keep an audit trail for unusually high-profile or intrusive stories.

https://ico.org.uk/media/for-organisations/documents/1552/data-protection-and-journalism-media-guidance.pdf

Is an “audit trail” to be key to success (or failure) in DPA s32?
If so, what about the defence under Defamation Act 2013 s4?

For background - more on “audit trail”: House of Lords, Communications Committee - Third Report – “The future of investigative journalism” (Chapter 3) (2010)
http://www.publications.parliament.uk/pa/ld201012/ldselect/ldcomuni/256/25602.htm

Note: difference between public interest in s32 DPA and in privacy tort

Campbell v MGN Ltd [2004] 2 AC 457 HL (3:2 for C).

Key decision on misuse of private information – did not consider the DPA: see [32] DPA claim 'stands or falls' with main claim (Nicholls); and [130] Hale.

- CA [2003] QB 633 (3:0 for D) considered both claims, including DPA [101ff] and the s32 exemption [120-129]. CA held it was reasonable to publish the whole 'journalistic package' in the public interest. It would not have been 'reasonably practicable' to comply with the data protection principles while making the publications. The three s32(1) conditions were satisfied: [136].

- BUT do the two claims stand and fall together? Different questions:-

- Privacy: **is** publication in the public interest?
- DPA claim: does the data controller (editor) **reasonably believe** that publication was in public interest?

Will the CA wonder about the relationship between s4 and PHA s1(3)(c)?

Hourani v Thomson & others

[2017] EWHC 432 (QB) (Warby J: Jmt after trial) (10.3.17)

- Four Ds found liable for harassment: the course of conduct was a campaign (organised and expensive) that included staging two “events” in London (fake demonstrations) and publishing images from / text about those events online, on websites set up for the purposes of the campaign. (Three Ds were also found liable in libel).

- The allegations made at the events and online were serious – the core allegation being that C was guilty of the murder of a young woman [115-121]. The course of conduct amounted to harassment, as the Ds knew or ought to have known [128-163].

Hourani (2)

- J rejected claim that the conduct was for the purpose of the prevention/ detection of crime: Protection from Harassment Act 1997 ("PHA"), s1(3)(a) [176-183].

- J also rejected claim that the conduct was "reasonable" in the circumstances: PHA s1(3)(c). He carried out an extensive review of the facts (there had been a 10-day trial) [184-235]

- While truth is not a defence to harassment (as Ds accepted), Ds argued that "whether, or to what extent, the allegations made are true is a factor going to the "comparative importance" of the specific rights being claimed" by Ds [188]. So J considered whether the allegations were true [189-125], examining – and comprehensively rejecting - Ds' "elaborate case theory" [189].

Hourani (3)

- J concluded that s1(3)(c) defence was not available to D1/D2 [201-205] or D5 [206-235].

- In J's view, the exercise of determining whether a course of conduct was "reasonable" under the PHA has "some similarities" with the evaluation of a s4 defence – there were "overlapping considerations". Since the interests protected by the claims in defamation and harassment were different, that would "affect the approach". But both were likely to engage Arts 8 and 10: "The reasonableness defence to harassment must be interpreted and applied in such a way as to strike an appropriate balance, giving due weight to the competing Convention Rights. The public interest defence to defamation is designed to achieve that same aim." [213]

Hourani (4)

- J noted on s4: “The question of whether a belief is reasonable for these purposes brings in considerations to which I have alluded already: bearing in mind the subject-matter, the words used, the nature of the allegations, and the role of the particular defendant, did the defendant conduct such enquiries as it is reasonable to expect of them, in all the circumstances?” [214]

- The same considerations “would seem to be relevant, albeit not necessarily conclusive” when considering s1(3)(c). “A defendant who meets the requirements of the defamation defence might expect to be acquitted of harassment, unless there is something about the element of harassment that makes it necessary to interfere with the Article 10 right nonetheless. [Ds] who do not believe that the publication of the offending statements was in the public interest, or had no reasonable belief that this was so, may well find those factors weigh against them in the overall assessment.” [215]

Will the approaches converge? And, if so, what about interim injunctions?

- Section 12 of the Human Rights Act 1998 requires the court considering granting an injunction to consider, amongst other factors, the extent to which "it is, or would be, in the public interest for the material to be published": s12(4)(b).

- The rule in *Bonnard v Perryman* – applicable only to *defamation* claims - has survived. For now. See, eg, *Greene v Associated Newspapers* [2005] QB 972 CA. The restrictions imposed by the rule cannot be side-stepped by suing in a different cause of action (see, eg, *Terry v Persons Unknown* [2010] EMLR 16 at [123]).

- But when causes of action overlap - what is the "nub" of the claim?

ERY v Associated Newspapers Ltd

- [2016] EWHC 2760 (QB), [2017] EMLR 9 (4.11.16) (Nicol J)

- D argued court should refuse privacy injunction, because the claim was about reputation and, in defamation, no interim injunction would be granted (D said a s4 defence would be available). Rejected at [67]: "A threatened publication may jeopardise both [C's] reputation and his privacy. It is no answer to an application for an injunction to restrain a threat to [C's] reasonable expectation of privacy that he could, alternatively, have pleaded a cause of action in defamation". Though if protection of reputation was the "nub" of the claim, C could not avoid the restrictions by formulating the claim in confidence or privacy, rather than libel (see Mann J: *Hannon v News Group* [2015] EMLR 1).

- Reputation was *not* the nub: C's claim had a "reputational element", but that was the case "with many privacy cases" and did not "take [C] far enough" [68].

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